

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION**

DON ANDERSON, individually and
on behalf of all others similarly
situated,

Case No.

Plaintiff,

CLASS ACTION COMPLAINT

VS.

DEMAND FOR JURY TRIAL

RAINBOW FOODMART,

Defendant.

10

Now comes DON ANDERSON ("Plaintiff"), on behalf of himself and all others similarly situated and alleges as follows:

INTRODUCTION

15 1. Plaintiff brings this action individually and on behalf of all others
16 similarly situated against Defendant RAINBOW FOODMART alleging violations
17 of the Electronic Fund Transfer Act, 15 U.S.C. § 1693 *et seq.* and its implementing
18 regulations 12 C.F.R. § 205 *et seq.* (hereinafter referred to collectively as the
19 “EFTA”).

20 2. The Congressional findings and declaration of purpose regarding the
21 EFTA are as follows:

(a) Rights and liabilities undefined

23 The Congress finds that the use of electronic systems to transfer funds
24 provides the potential for substantial benefits to consumers. However, due to
25 the unique characteristics of such systems, the application of existing
consumer protection legislation is unclear, leaving the rights and liabilities of
consumers, financial institutions and intermediaries in electronic fund
transfers undefined.

(b) Purposes

It is the purpose of this subchapter to provide a basic framework establishing the rights, liabilities, and responsibilities of participants in

1 electronic fund transfer systems. The primary objective of this
2 subchapter, however, is the provision of individual consumer rights.

3 15 U.S.C. § 1693.

4 3. Among other things, the EFTA imposes certain disclosure
5 requirements upon operators of automated teller machines ("ATMs").

6 4. 15 U.S.C. § 1693b(d)(3)(A) requires any ATM operator who imposes
7 fees on consumers in connection with electronic fund transfers to provide notice of
8 the fact that the fee is being imposed and the amount of the fee.¹

9 5. 15 U.S.C. § 1693b(d)(3)(B) identifies the location where the required
10 notice must be posted as follows:

11 (B) Notice requirements

12 (i) On the machine

13 The notice required under clause (i) of subparagraph (A) with respect
14 to any fee described in such paragraph shall be posted in a prominent
15 and conspicuous location on or at the automated teller machine at
16 which the electronic fund transfer is initiated by the consumer.

17 (ii) On the screen

18 The notice required under clauses (i) and (ii) subparagraph (A) with
19 respect to any fee described in such subparagraph shall appear on the
20 screen of the automated teller machine, or on a paper notice issued
21 from such machine, after the transaction is initiated and before the
22 consumer is irrevocably committed to completing the transaction....

23 6. The relevant implementing regulation, 12 C.F.R. § 205.16(c)

24 reinforces EFTA's statutory posting requirement, mandating that the mandatory fee
25 notice: 1) be posted in a "prominent and conspicuous location" on or at the ATM
26 machine; and 2) "on the screen of the automated teller machine or by providing it

27 _____
28 ¹ "Electronic fund transfer" is defined as "any transfer of funds, other than a transaction originated by check, draft,
or similar paper instrument, which is initiated through an electronic terminal, telephonic instrument, or computer or
magnetic tape so as to order, instruct, or authorize a financial institution to debit or credit an account. Such term
includes, but is not limited to, point-of-sale transfers, automated teller machine transactions, direct deposits or
withdrawals of funds, and transfers initiated by telephone...." 15 U.S.C. § 1693a(6).

1 on paper, before the consumer is committed to paying the fee.” 12 C.F.R. §
2 205.16(c)(1) and (2).

3 7. 15 U.S.C. § 1693b(d)(3)(C), and its implementing regulation, 12
4 C.F.R. 205.16(e), prohibit ATM operators from imposing a fee on a consumer
5 unless EFTA’s notice and posting requirements are followed by the ATM operator.

6 8. Specifically, 15 U.S.C. § 1693b(d)(3)(C) states, in relevant part:

7 (C) Prohibition on fees not properly disclosed and explicitly assumed by the
8 consumer

9 No fee may be imposed by any automated teller machine operator in
10 connection with any electronic fund transfer initiated by a consumer
for which a notice is required under subparagraph (A), unless—

11 (i) The consumer receives such notice in accordance with subparagraph
12 (B)...

13 9. In connection with the 2006 amendments to the EFTA, the board of
14 governors of the Federal Reserve published its final rule and official staff
15 interpretation which, *inter alia*, explained the EFTA’s disclosure requirements as
16 follows:

17 The final rule clarifies the two-part disclosure scheme established in Section
18 904(d)(3)(B) of the EFTA. The first disclosure, on ATM signage posted on
19 or at the ATM, allows consumers to identify quickly ATMs that generally
charge a fee for use. This disclosure is not intended to provide a complete
20 disclosure of the fees associated with the particular type of transaction the
consumer seeks to conduct. Until a consumer uses his or her card at an
21 ATM, the ATM operator does not know whether a surcharge will be imposed
for that particular consumer. Rather it is the second, more specific
22 disclosure, made either on the ATM screen or on an ATM receipt, that
informs the consumer before he or she is committed to the transaction
whether, in fact, a fee will be imposed for the transaction and the amount of
23 the fee...
24

25 71 F.R. 1638, 1656.
26

27 10. The EFTA imposes strict liability upon ATM operators which fail to
28

1 comply with its disclosure requirements. *See e.g., Flores v. Diamond Bank*, 2008
2 WL 4861511 (N.D. Ill., Nov. 7, 2008). *Cf. Bisbey v. D.C. National Bank*, 793 F.2d
3 315, 318-19 (D.C. Cir. 1986). (“Among the protections afforded to consumers is
4 the right to receive notice from the ATM operator of the existence and amount of
5 any fee that operator might impose on consumers for conducting transactions at the
6 ATM. 15 U.S.C. § 1693b(d)(3). This requires the ATM operator to place notice
7 both on the machine itself and upon the ATM screen. 15 U.S.C.
8 §1693b(d)(3)(B)”). A plaintiff seeking statutory damages under the EFTA need not
9 prove that he or she has sustained any actual financial loss, or that he or she relied
10 upon the lack of mandatory disclosure as an inducement to enter the transaction.
11
12 *See Burns v. First American Bank*, 2006 WL 3754820 *6 (N. D. Ill., Dec. 19, 2006)
13 (“Section 1693b(d)(3) prohibits an ATM operator from charging a fee unless it
14 provides notice of its fee on the machine and on the screen, period, no mention of a
15 necessary scienter.”)
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20 **JURISDICTION AND VENUE**

21 11. This Court has federal question jurisdiction pursuant to 28 U.S.C. §
22 1331 and 15 U.S.C. § 1693 *et. seq.*
23 12. Plaintiff’s claims asserted herein arose in this judicial district and
24 Defendant does substantial business in this judicial district and/or is the operator of
25 ATMs in this judicial district.
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27
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13. Venue in this judicial district is proper under 28 U.S.C. § 1391(b) and
2(c) and 1400(a) in that this is the judicial district in which a substantial part of the
acts and omissions giving rise to the claims occurred.

PARTIES

14. Plaintiff, Don Anderson, is and at all times relevant hereto was a resident of the state of New York.

15. Defendant, RAINBOW FOODMART (#109), is located at 232 West Meighan Blvd., Gadsden, Alabama 35901.

9 16. Defendant is an automated teller machine operator, as that term is
10 defined by 12 C.F.R. § 205.16(a) which states: "Automated teller machine operator
11 means any person that operates an automated teller machine at which a consumer
12 initiates an electronic fund transfer or a balance inquiry and that does not hold the
13 account to or from which the transfer is made, or about which the inquiry is made."

FACTS RELATED TO PLAINTIFF'S TRANSACTION

15 17. Specifically, Plaintiff made a cash withdrawal from Defendant's ATM
16 at the following locations:

18. At the time of the above-described electronic transaction, Plaintiff did
not maintain any accounts with Defendant.

22 19. At the time of the above-described transaction, Defendant was acting
23 as an “automated teller machine operator” that operated the automated teller
24 machine at which Plaintiff initiated an electronic fund transfer or a balance inquiry.

25 20. However, at the time of the above-described transaction, there was no
26 notice posted "on or at" the ATM operated by Defendant apprising consumers that
27 a fee would be charged for use of the ATM.

21. Because Defendant did not post the required notice, it was not permitted to charge a usage fee to Plaintiff and other class members.

CLASS ACTION ALLEGATIONS

22. Plaintiff brings this class action on behalf of himself and all other similarly situated pursuant to Rules 23(a) and 23(b) of the Federal Rules of Civil Procedure.

23. Plaintiff seeks to represent a class of persons to be defined as follows:

All persons who during the year preceding the filing of Plaintiff's complaint: 1) where charged a "terminal fee" at ATMs operated by Defendant when such persons made an electronic fund transfer and/or balance inquiry where, 2) no notice indicating that such fee was to be charged was posted on or at the outside of the ATM machine.

24. Congress expressly intended that the EFTA would be enforced, in part, through private class actions. 15 U.S.C. § 1693m(a).

25. The EFTA's class action enforcement provisions are identical, in relevant part, to the class action enforcement provisions of other consumer protection statutes and housed within the Consumer Credit Protection Act. (15 U.S.C. § 1692 *et seq.*) There is abundant authority interpreting and applying these statutory class action provisions, throughout the federal judiciary. Federal courts have routinely certified classes relating to consumer claims for statutory damages, generally, and for violation of the EFTA's ATM fee disclosure provisions, specifically. *See, e.g., Hammer v. JP's Southwestern Foods, LLC*, No. 08-cv-0339 (W.D. Mo.) (Gaitan, J.); *Flores*, *supra* 2008 WL 4861511 at 3-5; *Burns*, *supra*., 2006 WL 3754820 at *11-12; *Jackman v. Global Cash Access Holdings*, 09-cv-897 (W.D. Pa.) (McVerry, J.) (class certified and final settlement approval granted); *Nolf v. Allegheny Bank of Pittsburgh*, 09-cv-645 (W.D.Pa.) (Bissoon, J.) (class certified and final settlement approval granted); *Dragotta v. Northwest Bancorp, Inc. d/b/a Northwest Savings Bank*, 09-cv-632 (W.D. Pa.) (Fischer, J.) .(class certified and final settlement approval granted); *Parker v. First-Citizen Bank & Trust Company*, 09-cv-0588 (M.D. Tenn.) (Campbell, J.) .(class certified and final settlement

1 *approval granted); Polevoy v. Devon Bank, 08-cv-4822 (N.D. Ill.)(Kennelly, J.)*
 2 *(class certified and final settlement approval granted); Ochart v. Broadway Bank,*
 3 *08-cv-4893, (N.D. Ill.)(Castillo, J.)(class certified and final settlement approval*
 4 *granted); Anthony v. Fifth Third Bank (Chicago), 08-cv-4359, (N.D. Ill.)(Schenkier,*
 5 *J.)(class certified and final settlement approval granted); Zintel v. Financial*
 6 *Partners Credit Union, (C.D. CA), SACV 09-0868. (class certified and final*
 7 *settlement approval granted).*

8 26. Numerosity: The class described above is so numerous that joinder of
 9 all individual members in one action would be impracticable. The disposition of
 10 the individual claims of the respective class members through this class action will
 11 benefit both the parties and this Court.

12 27. Plaintiff is informed and believes, and thereon alleges, that there are at
 13 minimum, thousands of members of the class described above.

14 28. The exact size of the class and the identities of the individual members
 15 thereof are ascertainable through Defendant's records.

16 29. Members of the class may be notified of the pendency of this action by
 17 techniques and forms commonly used in class actions, such as by published notice,
 18 e-mail notice, website notices, first class mail, or combinations thereof, or by other
 19 methods suitable to this class and deemed necessary and/or appropriate by this
 20 Court.

21 30. Typicality: Plaintiff's claims are typical of the claims of the members
 22 of the class. The claims of the Plaintiff and members of the class are based on the
 23 same legal theories and arise from the same unlawful and willful conduct.

24 31. Plaintiff and members of the class were each consumers who used an
 25 ATM machine operated by Defendant to make an electronic fund transfer or
 26 balance inquiry and were charged a terminal owner fee, notwithstanding that the
 27 posting providing notice of the fee required by EFTA "on or at" Defendant's
 28 terminals was not present.

1 32. Common Questions of Fact and Law: There is a well-defined
2 community of interest and common questions of fact and law affecting members of
3 the class.

4 33. The questions of fact and law common to the class predominate over
5 questions which may affect individual members and include the following:

- 6 a. Whether, under 15 U.S.C. § 1693b(d)(3)(A) and 12 C.F.R.
7 205.16, Defendant was, at all relevant times, an automated teller
8 machine operator that imposed a fee on consumers for providing
host electronic fund transfer services to those consumers;
- 9 b. Whether Defendant complied with the notice requirements of 15
U.S.C. § 1693(d)(3)(B) and 12 C.F.R. 205.16; and,
- 10 c. Whether Plaintiff and members of the class are entitled to
statutory damages, costs and/or attorneys' fees for Defendant's
11 acts and conduct.

12 34. Adequacy of Representations: Plaintiff is an adequate representative
13 of the class because his interests do not conflict with the interests of the members of
14 the class. Plaintiff will fairly, adequately, and vigorously represent and protect the
15 interests of the members of the class and has no interests antagonistic to the
16 members of the class. Plaintiff has retained counsel who is competent and
17 experienced in the prosecution of class action litigation.

18 35. Superiority: A class action is superior to other available means for the
19 fair and efficient adjudication of the claims of the class. While the aggregate
20 damages which may be awarded to the members of the class are likely to be
21 substantial, the damages suffered by the individual members of the class are
22 relatively small. As a result, the expense and burden of individual litigation makes
23 it economically infeasible and procedurally impracticable for each member of the
24 class to individually seek redress for the wrongs done to them. Plaintiff does not
25 know of any other litigation concerning this controversy already commenced by or
26 against any member of the class. The likelihood of the individual members of the
27 class prosecuting separate claims is remote. Individualized litigation would also
28 present the potential for varying, inconsistent, or contradictory judgments, and

1 would increase the delay and expense to all parties and the court system resulting
2 from multiple trials of the same factual issues. In contrast, the conduct of this
3 matter as a class action presents fewer management difficulties, conserves the
4 resources of the parties and the court system, and would protect the rights of each
5 member of the class. Plaintiff knows of no difficulty to be encountered in the
6 management of this action that would preclude its maintenance as a class action.

SUBSTANTIVE VIOLATION

8 36. 15 U.S.C. § 1693b(d)(3)(A) provides that as a prerequisite to
9 imposition of a usage fee upon a consumer for host transfer services, an automated
10 teller machine operator must provide notice to the consumer consistent with
11 subparagraph (B) of that statutory section.

12 37. Subparagraph (B) of 15 U.S.C. § 1693(d)(3) provides in relevant part:

- (B) Notice requirements
 - (iii) On the machine

15 The notice required under clause (i) of subparagraph (A) with respect
16 to any fee described in such subparagraph shall be posted in a
17 prominent and conspicuous location on or at the automated teller
machine at which the electronic fund transfer is initiated by the
consumer.

18 38. In turn, subparagraph (c) of 15 U.S.C. § 1693b(d)(3) states, in relevant
19 part:

- 20 (C) Prohibition on fees not properly disclosed and explicitly assumed by the
21 consumer

22 No fee may be imposed by any automated teller machine operator in
23 connection with any electronic fund transfer initiated by a consumer
for which a notice is required under subparagraph (A), unless—

- 24 (i) The consumer receives such notice in accordance with subparagraph
25 (B)...

26 39. EFTA's statutory notice requirements are reinforced by the
27 implementing regulations set forth at 12 C.F.R. § 205.16.

40. Defendant violated the notice requirements of EFTA in connection with providing host transfer services to Plaintiff and the Class.

41. Defendant was prohibited from imposing any usage fee or similar fee for providing host transfer services because it failed to comply with EFTA's notice requirements.

42. 15 U.S.C. § 1693m provides that Defendant shall be liable to Plaintiff and Class for violations of 15 U.S.C. § 1693 *et seq.* in the amount of, *inter alia*, statutory damages to be determined by the Court, the costs of this action and reasonable attorneys' fees.

43. On November 27, 2009, the Federal Deposit Insurance Corporation (“FDIC”)- a major regulator of many banks—issued Financial Institution Letter 66-2009 reiterating the fact that the EFTA requires ATM operators to post ATM fee notices both (a) in a prominent and conspicuous location on or at the automated teller machine, and (b) on the screen or on paper before the consumer is committed to paying the fee. The letter also noted that the FDIC had first notified FDIC-supervised banks of these requirements in a Financial Institution Letter dated March 23, 2001 (FIL-25-2001).

44. By way of this action, Plaintiff seeks the imposition of statutory damages, costs of suit and attorneys' fees.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, on behalf of himself and the members of the class, prays for:

- a. An order certifying the class and appointing Plaintiff as the representative of the class, and appointing counsel for Plaintiff as counsel for the class;
 - b. An award to Plaintiff and the members of the class of statutory damages;
 - c. Payment of costs of suit; and,

1 d. Payment of reasonably attorneys' fees.

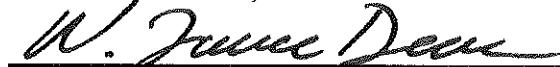
2 **A TRIAL BY JURY IS DEMANDED.**

3

4 Dated: September 19, 2012

Respectfully submitted,

5 DEAS & DEAS, LLC

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